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BOSTON, MA 02110

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DEC 07 2009

OFFICE OF PETITIONS

In re Application of	:	
Weltzin et al.	:	
Application No. 10/826,680	:	LETTER REGARDING
Filed: April 16, 2004	:	PATENT TERM ADJUSTMENT
Attorney Docket No. 06132/091001	:	

This letter is in response to the "Submission Concerning Patent Term Adjustment Calculation" filed July 10, 2009. Pursuant to applicants' duty of good faith and candor to the Office, applicants request the determination of patent term adjustment under 35 U.S.C. 154(b) be reviewed for accuracy.

The request for review of the patent term adjustment is **GRANTED**.

The Office has updated the PALM screen to reflect that the Patent Term Adjustment (PTA) determination at the time of the mailing of the Notice of Allowance is 371 days. A copy of the updated PALM screen, showing the correct determination, is enclosed.

On April 10, 2009, the Office mailed the Determination of Patent Term Adjustment under 35 U.S.C. 154(b) in the above-identified application. The Notice stated the patent term adjustment to date is 547 days.

Applicants state "the patent term adjustment indicated in the Determination appears to be longer than appropriate." Applicants do not state a basis for their disclosure that the Patent Term Adjustment on the Notice of Allowance disagrees with their apparent calculation of patent term adjustment. However, a review of the record reveals that the initial determination of patent term adjustment of 547 days is incorrect.

The Office mailed a final Office action on December 14, 2007. The final Office action allowed 2 claims and rejected 20 claims. Applicants filed a Notice of Appeal on June 16, 2008. Applicants filed a request for a five-month extension of time on January 15, 2009, but did not file a reply brief. The Office mailed a "Communication Re: Appeal" on April 10, 2009, stating the appeal was dismissed.¹ The Office also mailed a Notice of Allowance on April 10, 2009.

¹ 37 C.F.R. § 41.37(b) states, "On failure to [timely] file the brief, accompanied by the required fee, ... the appeal will stand dismissed."

The Office entered an increase in patent term adjustment of 176 days for delay in the filing of the Notice of Allowance. In other words, the Office increased the patent term adjustment by the number of days beginning on the day after the date four months after the Notice of Appeal was filed and ending on the date the Notice of Allowance was mailed.

The 176 day increase in patent term adjustment is not supported by any of the grounds listed in 37 C.F.R. § 1.703(a) and was improper. Pursuant to 35 U.S.C. 154(b)(1)(A)(ii), entry of a period of adjustment for Office failure to respond to a reply under section 132, or to an appeal taken under section 134, within 4 months after the date on which the reply was filed or the appeal was taken is proper. However, the phrase "the date on which" an "appeal was taken" in 35 U.S.C. 154(b)(1)(A)(ii) means the date on which an appeal brief (and not a notice of appeal) was filed. Moreover, the phrase "appeal brief in compliance with 37 CFR 1.192" requires that: (1) the appeal brief fee (37 CFR 1.17(c)) be paid (37 CFR 1.192(a)); and (2) the appeal brief complies with 37 CFR 1.192(c)(1) through (c)(9). 37 CFR 1.703(a)(4) pertains to the provisions of 35 U.S.C. 154(b)(1)(A)(ii) and specifies that the period is the number of days, if any, beginning on the day after the date that is four months after the date an appeal brief in compliance with 37 CFR 1.192 was filed and ending on the mailing date of any of an examiner's answer under 37 CFR 1.193, an action under 35 U.S.C. 132, or a notice of allowance under 35 U.S.C. 151, whichever occurs first. In this instance, no appeal was taken as no appeal brief was filed. See MPEP 2731. Accordingly, the 176-day increase in patent term adjustment will be removed.

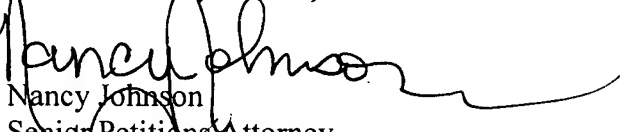
In view of the prior discussion, the patent term adjustment at the time of mailing of the notice of allowance is 371 days.

As this letter was submitted as an advisement to the Office of an error in applicants' favor, the Office will not assess the \$200.00 fee under 37 CFR 1.18(e). The Office thanks applicants for their good faith and candor in bringing this to the attention of the Office.

Applicants are reminded that any delays by the Office pursuant to 37 CFR 1.702(a)(4) and 1.702(b) and any applicant delays under 37 CFR 1.704(c)(10) will be calculated at the time of the issuance of the patent and applicants will be notified of the revised patent term adjustment to be indicated on the patent in the Issue Notification letter that is mailed to applicants approximately three weeks prior to issuance.

The Office of Data Management has been advised of this decision. This matter is being referred to the Office of Data Management for issuance of the patent.

Telephone inquiries specific to this decision should be directed to Senior Petitions Attorney Steven Brantley at (571) 272-3203.



Nancy Johnson
Senior Petitions Attorney
Office of Petitions

Enclosure: Copy of REVISED PALM screen

Day : Thursday
Date: 12/3/2009

PALM INTRANET

Time: 18:13:04

PTA Calculations for Application: 10/826680

Application Filing Date:	04/16/2004	PTO Delay (PTO):	723
Issue Date of Patent:		Three Years:	0
Pre-Issue Petitions:	0	Applicant Delay (APPL):	176
Post-Issue Petitions:	0	Total PTA (days):	371
PTO Delay Adjustment:	-176		

File Contents History

Number	Date	Contents Description	PTO	APPL	START
80	12/03/2009	ADJUSTMENT OF PTA CALCULATION BY PTO		176	
63	04/10/2009	MAIL NOTICE OF ALLOWANCE	176		51
62	04/07/2009	ISSUE REVISION COMPLETED			
61	04/01/2009	ALLOWED CASE RETURNED TO THE EXAMINER FOR CLERICAL PROCESSING			
60	04/01/2009	NOTICE OF ALLOWANCE DATA VERIFICATION COMPLETED			
59	03/27/2009	ELECTRONIC REVIEW			
58	03/27/2009	EMAIL NOTIFICATION			
57	03/27/2009	PG-PUB NOTICE OF NEW OR REVISED PROJECTED PUBLICATION DATE			
56	03/16/2009	RECEIPT OF ALL ACKNOWLEDGEMENT LETTERS			
54	03/04/2009	DOCUMENT VERIFICATION			
52	02/27/2009	NOTICE OF ALLOWABILITY			
51	06/16/2008	NOTICE OF APPEAL FILED		94	47
50	06/16/2008	REQUEST FOR EXTENSION OF TIME - GRANTED			
49	12/15/2007	ELECTRONIC REVIEW			
48	12/14/2007	EMAIL NOTIFICATION			
47	12/14/2007	MAIL FINAL REJECTION (PTOL - 326)			
46	12/10/2007	FINAL REJECTION			
43	10/01/2007	PARALEGAL TD ACCEPTED			
42	10/01/2007	PARALEGAL TD ACCEPTED			
41	09/24/2007	TERMINAL DISCLAIMER FILED		0	38
40	09/24/2007	TERMINAL DISCLAIMER FILED			
39	09/28/2007	DATE FORWARDED TO EXAMINER			

38	09/24/2007	RESPONSE AFTER NON-FINAL ACTION		63	36
37	09/24/2007	REQUEST FOR EXTENSION OF TIME - GRANTED			
36	04/23/2007	MAIL NON-FINAL REJECTION			
35	04/19/2007	NON-FINAL REJECTION			
34	03/05/2007	INFORMATION DISCLOSURE STATEMENT CONSIDERED			
33	03/05/2007	REFERENCE CAPTURE ON IDS			
32.7	03/05/2007	INFORMATION DISCLOSURE STATEMENT (IDS) FILED		19	30
32	03/05/2007	INFORMATION DISCLOSURE STATEMENT (IDS) FILED			
31	02/22/2007	DATE FORWARDED TO EXAMINER			
30	02/14/2007	RESPONSE TO ELECTION / RESTRICTION FILED			
29	02/14/2007	REQUEST FOR EXTENSION OF TIME - GRANTED			
28	12/15/2006	MAIL RESTRICTION REQUIREMENT	547		-1
27	12/11/2006	REQUIREMENT FOR RESTRICTION / ELECTION			
26	07/19/2004	INFORMATION DISCLOSURE STATEMENT CONSIDERED			
25	11/03/2006	CASE DOCKETED TO EXAMINER IN GAU			
24	03/12/2005	RECEIPT OF ACKNOWLEDGMENT LETTER			
23	11/16/2004	CASE DOCKETED TO EXAMINER IN GAU			
22	11/16/2004	IFW TSS PROCESSING BY TECH CENTER COMPLETE			
21	07/19/2004	REFERENCE CAPTURE ON IDS			
20.7	07/19/2004	INFORMATION DISCLOSURE STATEMENT (IDS) FILED			
20	07/19/2004	INFORMATION DISCLOSURE STATEMENT (IDS) FILED			
19	10/29/2004	APPLICATION RETURN FROM OIPE			
18	10/29/2004	APPLICATION RETURN TO OIPE			
17	10/29/2004	APPLICATION DISPATCHED FROM OIPE			
16	10/29/2004	APPLICATION IS NOW COMPLETE			
15	10/12/2004	PAYMENT OF ADDITIONAL FILING FEE/PREEXAM			
13	10/12/2004	A SET OF SYMBOLS AND PROCEDURES, PROVIDED TO THE PTO ON A SET OF COMPUTER LISTINGS, THAT DESCRIBE IN			
12	10/12/2004	A STATEMENT BY ONE OR MORE INVENTORS SATISFYING THE REQUIREMENT UNDER 35 USC			

		115, OATH OF THE APPLIC			
10	10/25/2004	CRF IS GOOD TECHNICALLY / ENTERED INTO DATABASE			
9	10/05/2004	AGENCY REFERRAL LETTER MAILED			
8	08/12/2004	NOTICE MAILED--APPLICATION INCOMPLETE-- FILING DATE ASSIGNED			
6	06/21/2004	REFERRED BY L&R FOR THIRD-LEVEL SECURITY REVIEW. AGENCY REFERRAL LETTER GENERATED			
5	06/17/2004	AUTO REFERRED BY PALM PRE EXAM			
4	05/19/2004	CLEARED BY OIPE CSR			
3	05/19/2004	CASE CLASSIFIED BY OIPE			
2	04/26/2004	IFW SCAN & PACR AUTO SECURITY REVIEW			
1	04/16/2004	INITIAL EXAM TEAM NN			

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EXPLANATION OF PTA CALCULATION

EXPLANATION OF PTE CALCULATION

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